Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

MORTON BARRY,

Petitioner,

v.

BURDINES AND THE TRAVELERS,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Florida

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether Section 440.15(3)(b)4.d, Florida Statutes (1991) is subject to and comports with the requirements of the Americans With Disabilities Act, 42 U.S.C. § 12101 *et seq.*?

PARTIES TO THE PROCEEDING

Petitioner, MORTON BARRY, is a resident of Sarasota, Sarasota County, Florida. Petitioner was the Petitioner before the Supreme Court of Florida, the Appellant before the First District Court of Appeal, First District, State of Florida, and the Claimant before the Judge of Compensation Claims, District M-North, State of Florida.

Respondent, BURDINES, is a corporation licensed to do business in the State of Florida. Respondent, THE TRAVELERS, is an insurance company licensed to do business in the State of Florida. Respondents were the Respondents before the Supreme Court of Florida, the Appellees before the District Court of Appeal, First District, State of Florida, and the Employer/Carrier before the Judge of Compensation Claims, District M-North, State of Florida.

There are no other parties to this action. However, since the constitutionality of Florida Statute Section 440.15(3)4.d is drawn into question, 28 U.S.C. § 2403(b) may apply to this action and the Attorney General for the State of Florida has been duly served and notified of this proceeding. The Attorney General's office was represented by counsel and presented oral argument on behalf of the State of Florida in the lower court proceeding before the Supreme Court of Florida.

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OPINIONS BELOW

The published opinion of the Florida Supreme Court that gives rise to this petition is *Barry v. Burdines*, 675 So.2d 587 (Fla. 1996). The published opinion of the Florida First District Court of Appeals is *Barry v. Burdines*, 667 So.2d 241 (1st D.C.A. 1995). These opinions and the unpublished order of the Judge of Compensation Claims, District M, State of Florida are reprinted hereto in the Appendix at pages 1-24.

BASIS FOR JURISDICTION

The opinion of the Florida Supreme Court was filed on June 15, 1996. This Court has jurisdiction to review a decision of a state court of last resort pursuant to 28 United States Code Section 1257.

STATUTORY PROVISIONS INVOLVED

The Americans with Disabilities Act, Title I, 42 U.S.C. § 12112 provides, in pertinent part:

> (a) GENERAL RULE. – No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) CONSTRUCTION. – As used in subsection (a), the term "discrimiante" includes –

(1) limiting, segregating, or classifying a job applicant or employee in such a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee; (2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this title (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration –

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

* * *

(2) QUALIFIED INDIVIDUAL WITH A DISABILITY. – The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication or transportation barriers, or the

> provisions of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

Florida Statute Section 440.15(3)4.d (1991) is set forth in the Appendix at pages 25-27.

STATEMENT OF THE CASE

This petition raises fundamental issues concerning the applicability of the Americans With Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*, to the workers' compensation laws of the State of Florida. The factual basis of this case is that the Petitioner, Morton Barry, was injured on the job and as a result of that injury became a disabled person within the meaning of the Americans With Disabilities Act. The Petitioner is entitled to all of the protections afforded by the federal ADA.

Upon reaching maximum medical improvement, the Petitioner was assigned a permanent physical impairment rating by his physician. This impairment rating was the sole factor taken into account in determining his entitlement to workers' compensation wage loss disability benefits. Other factors giving rise to Petitioner's disability, such as his age, education, skills and geographical location, were not considered and Petitioner was not given an individualized assessment to determine his disability status. Petitioner's eligibility and entitlement to disability wage loss benefits were predetermined by a statutory rating system. The Petitioner claimed that the

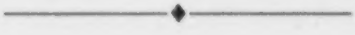
predetermined classification system violated his rights under the Americans With Disabilities Act because he was not afforded an individualized assessment as mandated by this Court in *School Board of Nassau County v. Arline*, 480 U.S. 273, 287 n.7, 107 S.Ct. 1123, 1131 n.7, 94 L.Ed.2d 307 (1987).

The Judge of Compensation Claims opined that the Petitioner met the definition of a disabled person under the ADA. The Judge of Compensation Claims also recognized that the Florida Workers' Compensation Law does not consider the distinction between "disability" and "impairment" in determining eligibility for disability benefits, but declined to rule on the federal question of the applicability of the ADA because it was not within his power to do so as a workers' compensation judge.

The matter was appealed to the Florida First District Court of Appeals which held that workers' compensation was not a term, condition or privilege of employment within the meaning of the ADA and certified the issue to be of great public importance.

The Supreme Court of Florida held that workers' compensation benefits were in fact terms, conditions and privileges of employment and were therefore subject to the proscriptions and prohibitions of the ADA. However, the Court held that Florida's statutory scheme, which predetermines entitlement to disability wage loss by the use of impairment ratings, satisfied the requirement of individualized assessment and was a cost-efficient way of handling large volumes of workers' compensation cases.

It is from this Florida Supreme Court decision that this Petition for a Writ of Certiorari arises.



REASONS FOR GRANTING THE WRIT

This petition presents questions concerning the state of civil rights legislation as defined in the Americans with Disabilities Act (ADA). 42 U.S.C. §§ 12101-12213 (Supp. V 1993). The ADA is an act of Congress based upon the best intentions yet an act that has left lower courts "in the quandry of being left without precise guidance from the circuit courts articulating the proper prima facie case. . . ." *Hutchinson v. United Parcel Services, Inc.*, 883 F.Supp. 379, 394 (N.D. Iowa 1995). In real terms, guidance can only come from this Court. An example of the judicial confusion is the decision of the Supreme Court of Florida in *Barry v. Burdines*, 675 So.2d 587 (Fla. 1996) (See Appendix I). In that case the Court was called upon to review a request by the lower court in *Barry v. Burdines*, 667 So.2d 241 (1st D.C.A. 1995) wherein the District Court certified the following question:

> Whether § 440.15(3)(b)4.d Florida Statutes (1991), is subject to and comports with the requirements of Title I of the Americans With Disabilities Act?

The Supreme Court of Florida in its opinion in *Barry* rejected the tenor of the certified question and by so doing permitted continued states' statutory discrimination which ignores the mandate of ADA. The Court seemed at first to conclude that workers' compensation laws are subject to the control of the American with Disabilities Act. But then, the Court back-tracked and denied or ignored the specific argument that the state statutory scheme at issue violated the ADA's provisions against discriminatory classifications. The Court achieved this result by adopting the rationality test for review, a

test illsuited for ADA concerns. As a result, an entire class of disabled persons in Florida is denied equal opportunities for benefits, equal as to other disabled persons. (App. 22).

It is important to note that Petitioner, under the standards established for qualifications within ADA, 1) *is* a qualified employee 2) is able to perform the essential functions of the employment and 3) has been subjected to an adverse decision because of disability. 42 U.S.C. § 12111(8). See, *e.g., White v. York Int'l Corp.*, 45 F.3d 360 (10th Cir. 1995); *Tyndall v. National Educ. Cts.*, 31 F.3d 209, 212 (4th Cir. 1994). Compare *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 287 n.7, 107 S.Ct. 1123, 1131 n.7, 94 L.Ed.2d 307 (1987). Petitioner received wage loss disability benefits for seventy-eight weeks under the Florida Statute. When his wage loss benefits were terminated by state action, it was solely because of his statutory classification, a nonapplicable classification dictated by state law. Fla. Stat. 440.15(3)(b)4.d. Petitioner now files this writ alleging discriminatory classifications by the state of Florida based upon disability.

The statutory scheme challenged is § 440.15(3)4.d, Florida Statutes (1991). The state in 440.15 has established a system of classifications which cut off wage loss disability benefits to claimants at a time determined not by individual need, but at a time determined solely by the classification. It is a system that requires pre-determined impairment ratings which translate into pre-determined disability. There is no mechanism for appeal. (App. 20).

This is not about discrepancy in benefits. There will always be a discrepancy among persons in benefits

because benefits are determined by a percentage of the wages lost. Petitioner's benefits terminated at 78 weeks; yet had he been permitted to challenge the classification, he might have been categorized differently and his disability wage loss benefits could have terminated at a later point in time. (App. 10-16).

Florida Workers Compensation categorizations are based upon assumptions, not individualized assessments. (App. 19-20). Courts in Florida ignore the fact that the ADA precludes categorizations based upon assumptions and requires, instead, an individual, case by case determination. See *e.g., Barry, supra* and *Cramer v. Florida,* 885 F.Supp. 1545 (M.D.Fla. 1995). Pre-determined impairment ratings cannot and should not be used solely to determine disability. Disability determinations require individualized assessments in which several factors are considered – one of which is impairment.

The preface to the State of Florida's legislative changes that brought about these statutory classification stated with perfect clarity that the "reductions in benefits" were done to save money for the employers by controlling the cost of compensation insurance. Chap. 90-201, 1990 Laws of Florida at 899. In other words, Petitioner lost wage loss benefits not because of factual, fair, and individual judicial determination, but solely because of a classification system designed for no other reason than to save employers' money.

This is precisely the type of classification the ADA forbids. The EEOC has specifically stated that the fact an individual's disability would cause insurance or workers' compensation costs to increase is *not* a justification for

discrimination. This Interpretative Guidance of Title I of the Americans with Disabilities Act, § 1630.15, App., in Appendix to 29 C.F.R. § 1630. The legislative history of the ADA is equally clear that increases in insurance costs are not a justification for discrimination. House Report No.101-85(II) at 136, 101st Cong., 2nd Sess., reprinted in USCCAN 394.

That discriminatory classifications are precluded by Title I of the ADA is beyond debate. The plain meaning of the text of the act itself forbids classifying an employee in a manner which adversely affects the disabled employee in any of the terms or conditions of his or her employment, the governing regulations also forbid discriminatory classifications. 42 U.S.C. § 12112(b)(1); see also 29 C.F.R. §§ 1630.5 and 1630.7 (addressing and prohibiting discriminatory classifications according to disability.)

Rather than come to terms with these issues, the Court took refuge in simply finding the classification system challenged was not inadequate, arbitrary, or discriminatory and that the challenged statutory classification was "fair and efficient." (One is left to ponder "fair and efficient" to whom – the employers for whom the arbitrary reductions in benefits were designed to placate?) No lengthy justification or explanation of these findings was offered. The fact is, no explanation can be offered, compelling or rational, to justify a discriminatory classification scheme specifically adopted to save employers' money at the expense of the injured and disabled employees.

In his arguments below, petitioner made a showing sufficient to give rise to an inference of discrimination on

the basis of disability. (App. 22). Petitioner argued that he had suffered an adverse workers compensation decision in that he was treated differently than others with lesser disability. *Id.* Further, the differing treatment within the disabled class was mandated by state action. (App. 23). But for the state actions, the discrimination would not have occurred. See *Hutchinson, supra* at 395.

As noted, the state classification at issue is in no way related to a valid objective of state government; it is mandated by law specifically as a cost-saving measure. It is therefore not only arbitrary, but discriminatory as well, and therefore, in violation of equal protection of the laws. *Spragens v. Secretary of Health and Human Services,* 808 F.Supp. 1537, 1540 (D. Wyoming 1992). Compare *Reed v. Reed,* 404 U.S. 71, 76, 92 S.Ct. 251, 254, 30 L.Ed. 225 (1971).

In its opinion, the Florida Supreme Court began by holding that "[T]he ADA is sufficiently broad to encompass the entitlement to workers' compensation benefits." *Barry,* App. 3. Indeed, the Court probably had little choice but to so hold since the Equal Employment Opportunity Commission, which is charged with enforcing the ADA, concluded that the ADA "supersedes any conflicting state workers' compensation laws."

Yet, further on, the Court's reasoning is inconsistent at best. The Court having concluded earlier that workers' compensation laws *are* subject to the ADA, then shifted, holding that the ADA and the workers' compensation system "were designed to fulfill different goals." *Id.* What 'different goals' is unclear. What is clear, however, is that the Court analyzed these goals and issues within the context of the rationality test. *Id.*

At inception, Florida's Workers' Compensation laws were aimed at relieving the hardships to workers created by on-the-job injuries. *McLean v. Mundy,* 81 So.2d 501 (Fla. 1955); *Florida Game & Fresh Water Fish Commission v. Driggers,* 65 So.2d 723 (Fla. 1953). The laws were a reasonable alternative not only to existing common law rights, but also to statutory schemes in place where the constitution of 1968 was adopted. *Acton v. Fort Lauderdale Hospital,* 440 So.2d 1282 (Fla. 1983) and *Sasso v. Ram Property Management,* 431 So.2d 204 (Fla. 1st DCA 1983), *aff'd, Sasso v. Ram Property Management,* 452 So.2d 932 (Fla. 1984). After 1990 the goals seemed to shift with a resulting discriminatory impact upon some disabled workers.

Enter the ADA. The ADA in strong terms provides that no employer:

> shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to . . . the hiring, advancement or discharge of employees. . . . 42 U.S.C. § 12112.

Title I of ADA prohibits discrimination in employment on the basis of a disability. [Pub.L. 101-336, § 108 (July 26, 1990)] Title II is the public entity provision of ADA. 42 U.S.C. § 12131-12134. Title II incorporates the "non-discrimination principles" of the Rehabilitation Act; it extends them to state and local governments. *Helen L. v. DiDario,* 46 F.3d 325, 329 (3d Cir. 1995). Congress concluded that "public officials historically have been among the major perpetrators of segregated services in this country." Cited in *Hutchinson, supra* at 387. One author analogizes the present state of public official discrimination against the disabled to the "Jim Crow laws" of old.

See Timothy M. Cook, *The Americans With Disabilities Act: The Move To Integration*, 64 Temp.L.Rev. 393, 400, 416 (1991) cited in *Hutchinson, supra.*

> [h]istorically, society has tended to isolate and segregate individuals with disabilities, and . . . such forms of discrimination . . . continue to be a serious and pervasive social problem. 42 U.S.C. § 12101(a)(2).

See *Hutchinson, supra* and *Helen L, supra* at 332. In light of the strong Congressional intent, consider interpretation of Florida Statute § 440.15 by Judge Joe Willis, Judge of Compensation Claims in Florida:

> It is clear that lesser-impaired disabled persons, such as the claimant herein (Petitioner), are not eligible for the same benefits as other disabled persons who have greater impairment ratings . . .
>
> * * *
>
> I recognize that all disabled persons, either as disabled persons as defined by the Americans with Disabilities Act or as used in the Florida Statutes or in other guides, are not eligible for the same disability under the Florida Workers' Compensation Law after July 1, 1990. *Barry v. Burdines*, Final Order Claim No. 12414 1047 June 8, 1992 Final Order Judge or Compensation Claims at 9 (dicta). App. 22.

With regard to the history of unequal treatment of persons with disabilities, as described by the judge of compensation claims, *supra*, Congress finds it to be 'real and compelling.' 42 U.S.C. § 12101(7).

Furthermore, Congress defines individuals with disabilities as a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotyped assumptions not truly indicative of the individual ability of such individuals. 42 U.S.C. § 12101 (*Congressional findings and purposes*).

It would seem that most courts agree that ADA protects individuals with disabilities from discrimination in almost every aspect of their lives. Most courts agree that the intent of the ADA is to prevent day-to-day discrimination against disabled persons by legislating a comprehensive social policy that prohibits discrimination because of a record of a disability or societal attitudes about disabled persons or physical barriers. Most courts agree that the ADA provides equal opportunity and equal treatment to individuals with disabilities, and in an effort to achieve this equality, the ADA imposes on entities subject to its provisions not only an obligation not to discriminate because of a disability, but also an obligation to provide reasonable accommodation for the individual's disability, unless providing such accommodation would impose undue hardship. See, *e.g.*, *Martin v. Voinovich*, 840 F.Supp. 1175 (S.D. Ohio 1993); *Wood v. County of Alameda*, 875 F.Supp. 659 (N.D. Calif. 1995); *Harding v. Winn-Dixie Stores, Inc.*, 907 F.Supp. 386 (M.D. Fla. 1995). Where courts *depart is* at the point in a record in which the court must find discrimination. That is what happened in *Barry*. The case (*Barry*) is complicated by the fact that the discrimination is a) state mandated and b)

involving one with a lesser impairment than petitioner. Herein lies the exact location for judicial guidance. *Hutchinson, supra* at 393.

The ADA is unquestionably the most sweeping piece of civil rights legislation since the Civil Rights Act of 1964 because, for the first time, federal law protects individuals with disabilities against discrimination on the basis of their disability. This protection is comparable to that extended to minority groups since 1964. It is clear that *Americans with disabilities are now a protected class.* They represent 20% of our population [43 million]. Robert L. Burgdorf, Jr., *The Americans With Disabilities Act: Analysis and Implications of A Second-Generation Civil Rights Statute,* 26 Harv. Civ.Rts.L.Rev. 413, 434 (1991). See also 42 U.S.C. § 12101(a)(7).

The Supreme Court of Florida found preemption yet utilized that finding to deny relief. Civil Rights legislation does not in the true sense of the word preempt; instead, it provides a minimum standard of relief for the protected class. The ADA Civil Rights Act is intended to maximize options available to workers, insuring fairness.

Congress concluded that ADA was intended to provide a national mandate for the diminution of discrimination against the disabled, to establish strong and consistent standards addressing such discrimination, and to ensure that federal agencies and courts implement Congress' intent with their broad regulatory, enforcement and interpretive powers. 42 U.S.C. § 12101(a). ADA mandates remedies that prevent, in the future, discrimination against this discrete and insular minority.

True ADA focuses generally upon disabled vs. non-disabled but nowhere in the legislation is the focus to the exclusion of discrimination within a disability category. *Hutchinson, supra* 395. Clearly, the purposes of ADA would be undermined by an interpretation which would in effect allow each state to supersede the ADA with its own statutes simply by placing an exclusivity provision in those statutes. That is precisely what the Court below ignored. In doing so the Court adopted the rationality test (App. 3) that ordinarily would be correct. See *Cleburne, Tex. v. Cleburne Living Center,* 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). However, Congress rejected the 1985 *Cleburne* rationality test for disability and substituted in its place in 1990 a heightened intermediate scrutiny standard. 42 U.S.C. § 12101(a)(7) (Supp. 1990): "Individuals with disabilities are a discrete and insular minority. . . . "

If a class has experienced a "history of unequal treatment" or been subjected to unique discrimination on the basis of stereotyped characteristics not truly indicative of their abilities, for example, gender based discrimination, this court has concluded that heightened – intermediate – scrutiny is the standard for review. See, *e.g., Mississippi University for Women v. Hogan,* 458 U.S. 718, 1025 S.Ct. 3331, 73 L.Ed.2d 1090 (1982) and *United States v. Virginia,* ___ U.S. ___, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996).

While the Florida Supreme Court hints at the fact that the goals of workers' compensation laws are subject to valid national civil rights legislation, the Court nevertheless ignored this axiom and in so doing, withdrew the impact upon state workers' compensation, of the

ADA's equal rights mandate. If the opinion and its companions are allowed to stand, then workers' compensation benefits are for all intents and purposes outside of ADA's control. The fact is lower courts are unclear as to the level of scrutiny. A statutory provision can hardly be said to be within the scope of the ADA and at the same time "designed to fulfill different goals" than the ADA. *Barry, supra,* App. 3-4.

The fact of the matter is, regardless of the semantics involved, ADA and the worker's compensation system are both designed to aid disabled workers. The language in Title I itself, plus the EEOC technical assistance manual, [Americans With Disabilities Act of 1990, EEOC Technical Assistance Manual and Resource directory, § 9.66 (1992)] and the governing provisions in the Code of Federal Regulations leave no doubt that "benefits" to employees – including life, disability and health insurance – are within the scope of the ADA. Yet in holding that workers' compensation benefits are somehow both within and without the ADA's scope, the state supreme court simply did not address "the critical" issue. The *Barry* opinion leaves state workers' compensation judges with the impression that Title I of the ADA *only* addresses "artificial, arbitrary and unnecessary barriers to employment . . . " App. 3.

The *Barry* Court simply refused to face the hard question asked by every Civil Rights Act: 1) Is state law, regardless of its goals, in conformity with the Civil Rights Act; or, if in conflict, must it be altered to conform? They did answer, only incorrectly: 1) What is the standard of review? App. 3. See for an analysis: *Hutchinson, supra.*

In *Pushkin v. Regents of the University of Colorado*, 658 F.2d 1372 (10th Cir. 1981), the plaintiff instituted an action based on the claim that he was denied admittance to a psychiatry residency program because he suffered from multiple sclerosis. An issue the court faced was what standard of review to apply when there is an alleged violation of the Rehabilitation Act of 1973. The court held that a higher standard than a "rational basis test" is mandated. *Id.* at 1383. The defendant in *Pushkin* argued that their decision not to admit the plaintiff to the residency program must be reviewed under equal protection standards, and must therefore be affirmed under the rational basis test. *Id.* The court held that the rational basis test is not applicable where there is an alleged violation of § 504 of the Rehabilitation Act. In its reasoning, the court stated that the standards for determining the merits of a case under § 504 are contained in the statute. *Id.* at 1384. The court further reasoned that to ask the court to defer to a rational basis argument when analyzing a claim under § 504 is to ask the court to ignore the plain statutory language of § 504. *Id.* The court added that to apply a rational basis test would be to reduce the statute to "nothingness, which should be avoided." *Id.*

Pushkin was cited favorably in *Maine Human Rights Commission v. Canadian Pacific Ltd.*, 458 A.2d 1225 (Maine 1983). In *Maine Human Rights Commission*, the plaintiffs brought an action alleging that the defendant unlawfully discriminated against the individual plaintiffs because of their physical handicaps in violation of their rights under the Maine Human Rights Act. The court held that

> the 'rational relationship' test, as generally applied in (non discrete and insular minority)

> constitutional equal protection analysis, requires only that some conceivable set of facts could rationally support the distinction above . . . [S]uch a highly deferential standard of review, is clearly inappropriate when reviewing the adequacy of an affirmative defense raised by an employer against whom a case of employment discrimination has already been established. *Id.* at 1231. (citing *Pushing, supra*).

See also Williams v. Colorado Springs School District, 641 F.2d 835, 841 (10th Cir. 1981) (rational relationship inapplicable in gender discrimination cases under Title VII of the Civil Rights Act of 1964).

Other Civil Rights cases have held that discrimination within a similar class presents courts with a valid cause of action, and heightened scrutiny is the standard for review. *See Walker v. Secretary of the Treasury*, 713 F.Supp. 403 (N.D. GA. 1989) (Allegation by black former employee that she was discharged by black supervisor because she was a "light-skinned" black person, white supervisor was a "dark-skinned" black person, stated a valid cause of action for discrimination under Title VII of the Civil Rights Act of 1964). See also, *Rodriguez v. Gattuso*, 795 F.Supp. 860 (N.D. Ill. 1992) (the Fair Housing Act's prohibition against discrimination on the basis of color applied even if prospective tenants and landlords were of the same race).

Not all courts agree at least within the context of ADA: In *Cramer v. Florida*, 885 F.Supp. 1545 (M.D. Fla. 1995), the court held that the ADA did not apply to alleged discrimination between two disabled persons by

favoring one over another. The court, applying a rationality test, found that the Florida Workers' Compensation Statute did not violate the ADA by use of "impairment" ratings even though persons with lesser impairment ratings and thus lower benefits might be more disabled than persons with higher impairment ratings because the courts interpreted the ADA to apply only to discrimination against *disabled* persons compared to *nondisabled* persons. However, the Court relief upon *Traynor v. Turrage*, 485 U.S. 535, 108 S.Ct. 1372, 99 L.Ed.2d 618 (1988), a case which should have been clearly distinguishable. In *Traynor*, entitlement to veterans benefits were denied to alcoholic veterans if their alcoholism was the result of wilful misconduct. The petitioners were denied benefits because they were found to have engaged in misconduct. This is not the case herein.

The debate continues. In *Muller v. Hotsy Corporation*, 917 F.Supp. 1389 (N.D. Iowa 1996) *and Hutchinson v. United Parcel Service, Inc.*, 883 F.Supp. 379 (N.D. Iowa 1995), the courts found that in an ADA case, at the prima facie case phase, a plaintiff need only make a showing that gives rise to an inference of discrimination on the basis of disability. *Muller* at 1410; *Hutchinson* at 395. The courts did not limit causes of action to actions between disabled plaintiffs who were treated less favorably than non-disabled persons like *Barry* and *Cramer*. Instead, the court found that a prima facie case can be shown if the plaintiff were treated less favorably than non-disabled person or those with lesser disabilities, or even those whose disabilities are more easily accommodated. *Id.*

The courts reasoned that ADA protections should not come into play only if the disabled plaintiff were treated

less favorably than a non-disabled person. *Id.* The courts viewed the ADA much broader; they found that if one is terminated or treated in a discriminatory manner resulting in favorable treatment to another within the class ADA applies, just as surely as where the employer terminates a plaintiff in favor of another who also fits within the ADA's definition of "disabled," but whose disability is more cheaply or easily accommodated, as when the plaintiff is terminated in favor of a non-disabled person. *Id.* If the ADA permitted such a substitution of disabled persons, the court found that it would create a scenario wherein employers were permitted to discriminate among members of the ostensibly protected class. *Muller* at 1411; *Hutchinson* at 395. The ADA defines the class of disabled persons rather than allowing employers to control whom the ADA protects. *Id.*

The same arguments apply to the Florida Worker's Compensation Statute's impairment ratings which, under color of state law, permit discrimination among the members of the ostensibly protected class. Florida courts have already created the scenario feared in *Muller* and *Hutchinson* – wherein the discrimination against one disabled person in favor of another disabled person is permitted. At the very least, there is a discrepancy between jurisdictions as to the interpretation of the application of the ADA – whether it only applies to a disabled plaintiff versus a nondisabled person or whether, as in the Iowa cases, the ADA was intended to prohibit discrimination against the disabled regardless of whether it is in favor of a nondisabled person or a person with lesser disabilities.

In *Martin v. Voinovich,* 840 F.Supp. 1175 (S.D. Ohio 1993), a class of persons with mental retardation or development disabilities and a subclass of medicaid recipients brought an action alleging violations of civil rights under the Constitution, the Rehabilitation Act, Americans with Disabilities Act, and Development Disabilities Act. The defendants in *Martin* alleged that § 504 of the Rehabilitation Act did not provide relief when the discrimination was between persons with different handicaps, as opposed to between handicapped persons and non-handicapped persons. *Id.* at 1190. The court held that, as a matter of statutory construction, nothing in the language of § 504 suggests that it can never apply between persons with different handicaps. In its reasoning the court stated,

> The language of § 504 evinces an intention to eliminate handicap-based discrimination and segregation. A strict rule that § 504 can never apply between persons with different disabilities would thwart that goal. Such a rule would in effect, allow discrimination on the basis of disability. The relevant inquiry is whether the application of § 504 between persons with different or varying degrees of disability furthers the goal of eliminating disability-based discrimination . . . The severity of plaintiffs' handicaps is itself a handicap which under § 504, cannot be the sole reason for denying plaintiffs access to community programs.

In a more recent case the United States Court for Connecticut held that the regulations promulgated under both § 504 of the Rehabilitation Act and the ADA clearly prohibit discrimination based upon severity of disability. *Messier v. Southbury Training School,* 916 F.Supp. 113 (D.

Conn. 1996). In *Messier,* residents of a state institution for persons with mental retardation sued the institution alleging discrimination in community placement based on the severity or nature of their disabilities. *Id.* at 136. The *Messier* court noted that numerous courts have recognized that both § 504 Rehabilitation Act and the ADA prohibit discrimination on the basis of severity of a person's disability. Citing *Helen L. v. DiDagrio, supra* 336: ("[I]f Congress were only concerned with disparate treatment of the disabled as compared to their nondisabled counterparts," the ADA's reference to the persistence of discrimination in institutionalization would constitute a "non sequitur"); *Plummer v. Branstad,* 731 F.2d 574, 578 (8th Cir. 1984) (severity of handicap cannot be sole reasons for denying Title XX funding); *Jackson v. Fort Stanton Hosp. & Training School,* 757 F.Supp. 1243, 1299 (D.N.M. 1990) ("The severity of plaintiffs' handicaps is itself a handicap which, under § 504, cannot be the sole reason for denying plaintiffs access to community programs."), rev'd on other grounds, 964 F.2d 980 (10th Cir. 1992); *Garrity v. Gallen,* 522 F.Supp. 171, 214-5 (D.N.H. 1981) (discrimination based upon a generalized assumption concerning the abilities of a group of severely handicapped persons is actionable under § 504; *Lynch v. Maher,* 507 F.Supp. 1268, 1278-9 n.5 (D. Conn. 1981) (discrimination on the basis of extent of handicap is actionable under § 504).

In *Cramer, supra,* the Court cited this Court's opinion in *Traynor v. Turnage,* 485 U.S. 535, 108 S.Ct. 1372, 99 L.Ed.2d 618 (1988) as supportive of its holding that nothing in the Rehabilitation Act requires that any benefit extended to one category of handicapped persons also be

extended to all other categories of handicapped person. *Cramer, supra* at 1152. The court in *Messier,* however, disagreed. *Messier* held that:

> The primary holding of *Traynor* was that the 1978 amendments to the Rehabilitation Act of 1973 should not be deemed to have repealed a 1977 statute which allowed for an extension of time to use veterans' benefits under certain circumstances, but only on the condition that a veteran's physical or mental disorder was not a result of willful misconduct by that veteran. The court did state in dicta that "the central purpose" of § 504 is to "assure that handicapped individuals", and that "there is nothing in [§ 504] that requires that any benefit extended to one category of handicapped persons also be extended to all other categories of handicapped persons." However, the circumstances underlying Traynor clearly show that the Court was not considering whether discrimination based upon extent of disability is generally actionable under § 504. Rather, the Court had no need to consider this question, because the regulations promulgated under § 504 provide that § 504 does not prohibit "exclusion of a specific class of handicapped persons from a program limited by federal statute or executive order to a different class of handicapped persons." This exception to § 504's coverage is clearly not applicable to the instant case.

Meisser, 916 at 141 n.7 (all internal citations omitted).

Non ADA cases are also instructive, *Brown v. Beal,* 414 F.Supp. 770 (E.D. Pa. 1975), found that the disparate treatment of similarly situated "disabled" persons under Pennsylvania's medicaid program raised a substantial

constitutional question of equal protection under the Fourteenth Amendment – whether that classification of disabled individuals rationally furthers a legitimate state interest. Also, in *Spragens v. Secretary of Health and Human Services*, 808 F.Supp. 1537 (D.Wyo. 1992), the court found that a statutory classification pursuant to which a quadriplegic suffering from erythropoieses lost his disability benefits by having net earnings between $300 and $650 per month, while a person disabled by blindness who earned the same amount would continue to receive disability benefits, was arbitrary and discriminatory in violation of equal protection. The court stated that the disabled are a sensitive class and when classifications involve sensitive but nonsuspect classes, the courts may engage in a more substantial analysis of rationality. *Id.* at 1540. A classification must be reasonable, not arbitrary, and must rest upon some ground of deference having a fair and substantial relationship to the object of the legislation. *Id.* However, the court found that if the reason for the classification is to save costs, then it is not a legitimate objective. *Id.* at 1542. Saving welfare costs did not justify an otherwise invidious classification. *Id.*

In *Barry*, the state Court of last resort makes note of the fact that the use of the impairment ratings of the Florida Workers' Compensation Statute is an "efficient method for handling the large volume of workers' compensation claims filed in this state. . . . " App. 4. Thus an important federal question has been decided adversely to federal law as well as other state and federal courts' decisions interpreting that federal law.

The court in *Barry* missed the mark. Saving money, though a laudable goal for any government, cannot be

utilized as a justification for discrimination against a discrete and insular minority.

Congress, in enacting the ADA, did not intend such a result as *Barry*. Congress, after many false starts, enacted civil rights legislation to protect the disabled. Congress, in the legislation, established a heightened level of scrutiny eschewing *Cleburne's* rationality standard. Since 1990 courts in both the federal and state systems continue to divide as to the local impact of ADA and an appropriate level of review. The entire scenario is in fact a replay of gender based discrimination cases wherein states argue that within certain programs such as military instituting single gender higher education should be subjected to a benign rationality standard. This position was rejected in *United States v. Virginia*, ___ U.S. ___, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996), wherein this Court answered Virginia with constitutional mandates. The same compelling reasons for relief are at work in the present case.

CONCLUSION

Dysfunctional decisions by lower courts dictate the necessity for guidance, this court is the only remaining clarifying agency, short of Congressional reentry, to resolve the conflict.

For the reasons stated, it is respectfully submitted that the petition for a writ of Certiorari should be granted.

Respectfully submitted,

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SUPREME COURT OF FLORIDA

No. 86,365

MORTON BARRY,

Petitioner,

vs.

BURDINES, et al.,

Respondents.

[June 13, 1996]

SHAW, J.

We have for review *Barry v. Burdines*, 667 So. 2d 241 (Fla. 1st DCA 1995), wherein the district court certified:

> Whether section 440.15(3)(b)4.d[.], Florida Statutes (1991), is subject to and comports with the requirements of Title I of the Americans with Disabilities Act?

We have jurisdiction. Art. V, § 3(b)(4), Fla. Const. We answer in the affirmative and approve *Barry*.

Morton Barry was injured August 6, 1992, while employed at Burdines and received temporary total disability compensation until November 23, 1992, when he reached "maximum medical improvement." Barry returned to work in a limited capacity November 23, 1992, and began receiving wage-loss benefits for a period of seventy-eight weeks based on an impairment rating of

nine percent under section 440.15(3)(b)4.d., Florida Statutes (1991).[1]

Barry filed this workers' compensation action claiming that section 440.15(3)(b)4.d. violates Title I of the Americans with Disabilities Act[2] (ADA) because it segregates disabled individuals arbitrarily and deprives the disabled of an individualized assessment of their disabilities. The claims judge ruled against Barry and the district court affirmed, certifying the above question.

The threshold issue is whether section 440.15(3)(b)4.d. is subject to the ADA. Burdines argues that the ADA is inapplicable because compensation under the Florida Workers' Compensation Act[3] (FWCA) is not an employer-controlled benefit of employment. We disagree.

---

[1] Section 440.15(3)(b)4.d., Florida Statutes (1991), provides in part:

> d. For injuries occurring after June 30, 1990, the employee's eligibility for wage-loss benefits shall be determined according to the following schedule:
>
> (I) Twenty-six weeks of eligibility for permanent impairment ratings up to and including 3 percent;
>
> (II) Fifty-two weeks of eligibility for permanent impairment ratings greater than 3 and up to and including 6 percent;
>
> (III) Seventy-eight weeks of eligibility for permanent impairment ratings greater than 6 and up to and including 9 percent. . . .

[2] 42 U.S.C. ch. 126 (Supp. III 1991).

[3] Ch. 440, Fla. Stat. (1991)

The ADA is sufficiently broad to encompass the entitlement to workers' compensation benefits. *See generally* 42 U.S.C. § 12112(a) (Supp. III 1991). The Equal Employment Opportunity Commission (EEOC), which is charged with enforcing the ADA, has concluded that the ADA "supersedes any conflicting state workers' compensation laws." *Americans with Disabilities Act of 1990: EEOC Technical Assistance Manual and Resource Directory,* § 9.6.b. (1992). Furthermore, the preemption clause within the ADA itself implies as much. *See* 42 U.S.C. § 12201(b) (Supp. III 1991). *See also Harding v. Winn-Dixie Stores, Inc.,* 907 F. Supp. 386 (M.D. Fla. 1995) (entitlement to workers' compensation benefits is subject to the ADA). Accordingly, we find that section 440.15(3)(b)4.d. is subject to the ADA.

The next question is whether section 440.15(3)(b)4.d. comports with the ADA. Barry argues that the impairment classifications are arbitrary, are not rationally related to the goal of compensating disabled workers for lost earnings, and do not provide claimants with sufficiently individualized assessments. We disagree.

The ADA and the FWCA were designed to fulfill different goals. The ADA was intended to prevent the prejudicial treatment of disabled persons and to allow such persons to compete in the workplace. *See* 29 C.F.R. pt. 1630, app. (1995). The ADA does not purport to guarantee equal rights to workers' compensation benefits for all handicapped persons regardless of their varying abilities to work. Rather, the ADA simply requires the removal of all "artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other

impermissible classifications." *Griggs v. Duke Power Co.*, 401 U.S. 424, 430, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971).

The FWCA, on the other hand, was created to provide an injured employee with an efficient delivery of disability and medical benefits at a reasonable cost to the employer. *See* § 440.015, Fla. Stat. (1991). The FWCA imposes no barriers such as those mentioned above in *Griggs*, and the criteria employed by the FWCA are not inadequate, arbitrary, or discriminatory. The impairment system set forth in section 440.15(3)(b)4.d. is a fair and efficient method for handling the large volume of workers' compensation claims filed in this state, and the assessment procedure is sufficiently individualized to satisfy the ADA. We conclude that section 440.15(3)(b)4.d. comports with the ADA.

In addressing Barry's claim that the ADA preempts section 440.15(3)(b)4.d., this Court need look only to the language of the ADA itself, which provides that the ADA shall not be construed as invalidating any federal or state law that provides equal or greater protection. *See* 42 U.S.C. § 12201(b) (Supp. III 1991). In light of our finding that section 440.15(3)(b)4.d. comports with the ADA, we conclude that the ADA does not preempt this section.

Finally, to succeed in his claim that the assignment of benefits in this particular case violates the ADA, Barry must show either a discriminatory intent or result. *See generally* 42 U.S.C. §§ 12112(a)-(b) (Supp. III 1991); 29 C.F.R. §§ 1630.1, 1630.5, 1630.7 (1995). He has shown neither.

We answer the certified question in the affirmative and approve *Barry*.

It is so ordered.

KOGAN, C.J., and OVERTON, GRIMES, HARDING, WELLS and ANSTEAD, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

2ND CASE of Level 1 printed in FULL format.

MORTON BARRY, Appellant, v. BURDINES and THE TRAVELERS, Appellee.

CASE No. 94-2067

COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

667 So. 2d 241; 1995 Fla. App. LEXIS 8855; 20 Fla. Law W. D 1923

August 23, 1995, Filed

NOTICE: NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DISPOSED OF.

PRIOR HISTORY: An Appeal from an order of the Judge of Compensation Claims. Joseph E. Willis, Judge.

COUNSEL: Alex Lancaster of Lancaster & Eure, Sarasota, for Appellant.

Cindy R. Galen of O'Riorden, Mann, Hootman, Ingram & Dunkle, P.A., Sarasota, for Appellees.

JUDGES: ALLEN and DAVIS, JJ., and WENTWORTH, SENIOR JUDGE, CONCUR.

OPINION BY: PER CURIAM

OPINION:
PER CURIAM.

The claimant appeals a workers' compensation order denying a claim for wage loss benefits in excess of the 78 weeks allowed under section 440.15(3)(b)4.d.(III), Florida Statutes (1991). The claimant contends that by conditioning the duration of wage loss eligibility on the degree of physical impairment section 440.15(3)(b)4.d violates the Americans with Disabilities Act (ADA), *42 USC section*

1210l et seq. We conclude that the claimant has not established an ADA violation, and we therefore uphold the statutory limitation on eligibility for wage loss benefits.

Section 440.15(3)(b)4.d provides a graduated schedule which varies the duration of wage loss eligibility in accordance with a claimant's physical impairment rating. Because the claimant's impairment was rated at nine percent, his eligibility is constrained by the 78 week limitation in section 440.15(3)(b)4.d.(III). In situations involving greater impairment ratings, eligibility can extend for as much as 364 weeks. See § 440.15(3)(b) 4.d.(V), Fla. Stat. (1991).

The claimant presents this case under Title I of the ADA,[1] which provides at section *42 USC section 12112*(a) that:

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees,

---

[1] No other issue was raised below, but the judge's adjudicatory authority was involved by the claim for benefits, which the judge denied by applying the challenged statute. Although the judge could not invalidate the statute, the record was sufficiently developed to permit consideration of the issue on appeal. The absence of any independent issue below does not negate the availability of this process, which preserves the claimant's potential recourse to workers' compensation benefits while effecting an expeditious ruling on the statutory challenge. Such consolidation of actions is consistent with the rationale for permitting an appellate determination in these circumstances. See *Key Haven Associated Enterprises v. Board of Trustees, 427 So. 2d 153 (Fla. 1982).*

employee compensation, job training, and other terms, conditions, and privileges of employment.

The claimant asserts that the provisions of the Workers' Compensation Law constitute terms, conditions, and privileges of employment within the ambit of section 12112(a). But in *O'Neil v. Department of Transportation, 468 So. 2d 904* (Fla.), cert. denied, *474 U.S. 861, 106 S. Ct. 174, 88 L. Ed. 2d 144 (1985),* the Florida Supreme Court determined that the provisions of the Workers' Compensation Law do not constitute "compensation, terms, conditions, or privileges of employment" within the ambit of the Age Discrimination in Employment Act, *29 USC section 621,* et seq. Because the same essential language governs the present case under the ADA, the ruling in O'Neil raises a question as to whether the same interpretation would pertain whereby section 440.15(3)(b)4.d might not be controlled by Title I of the ADA.

Even apart from the concerns raised by O'Neil, the ADA argument which the claimant now asserts was rejected in a recent federal decision. Like the present case, *Cramer v. State, 885 F. Supp. 1545 (M.D. Fla. 1995),* involved an assertion that by conditioning the duration of wage loss eligibility on the degree of physical impairment section 440.15(3)(b)4.d.(III) impermissibly deprives disabled workers of equal opportunity or eligibility for workers' compensation benefits. In rejecting this argument in Cramer the court found several reasons to uphold the statute, while emphasizing the differing purposes of the ADA and workers' compensation. However, the court did not refer to O'Neil, and suggested that the ADA may apply to the Workers' Compensation Law.

Because the claimant has not clearly shown an ADA violation, we affirm the appealed order. In accordance with Florida Rule of Appellate Procedure 9.030(a)(2)(A)(v), we certify the following question of great public importance:

WHETHER SECTION 440.15(3)(b)4.d, FLORIDA STATUTES (1991), IS SUBJECT TO AND COMPORTS WITH THE REQUIREMENTS OF TITLE I OF THE AMERICANS WITH DISABILITIES ACT?

ALLEN and DAVIS, JJ., and WENTWORTH, SENIOR JUDGE, CONCUR.

STATE OF FLORIDA
DEPARTMENT OF LABOR AND
EMPLOYMENT SECURITY OFFICE
OF THE JUDGE OF COMPENSATION CLAIMS
DISTRICT M NORTH

MORTON BARRY, Claimant, vs. BURDINES, THE TRAVELERS (CSSC), Employer/Carrier.	)	Claim No.: 124 14 1047 D/A: 8/6/92

LANCASTER & EURE, P.A., Sarasota, for the Claimant, PAUL N. INGRAM, ESQUIRE, Sarasota, for the Employer/Carrier.

FINAL ORDER

This matter came on to be heard for final hearing on Wednesday, May 18, 1994. The claimant was represented by Attorney Alex Lancaster and the employer/carrier was represented by Attorneys Paul Ingram and Hermes Eraclides. All parties are commended for their excellent representation and arguments herein. Since this claim represents some unique and new arguments, I feel it is best to preface the claim and defenses with a short factual summary.

The claimant was injured on August 6, 1992, while working for Burdines, the employer herein. Thereafter, the claimant was paid temporary total disability benefits

by the employer/carrier until reaching maximum medical improvement on November 23, 1992. Thereafter, the employer/carrier paid to the claimant 78 weeks of wage loss benefits in accordance with §440.15 Fla. Stat., since Dr. Shkolnikov had assigned a 9% impairment rating. There is an agreement between the parties that all temporary total was paid to the claimant and that all 78 weeks of wage loss benefits were paid to the claimant in accordance with the impairment schedule. Furthermore, the parties agreed that the claimant was not permanently and totally disabled and that reasonable accommodations had been made by the employer when the claimant had returned to work for the employer after reaching maximum medical improvement and they also agree the employer had 25 or more employees.

It was the position of the claimant that the payment to the claimant of only 78 weeks of benefits in accordance with the impairment schedule set forth in §440.15 violated the claimant's rights under the Americans With Disabilities Act in that the claimant had been denied the same eligibility for wage loss benefits that all other "disabled" persons injured while working for the employer are entitled. It was also the claimant's position that payment of wage loss for 78 weeks violated several state and federal constitutional rights, including but not limited to, due process, equal protection, the right to be rewarded for industry and denial of due process.

It was the position of the employer/carrier that they had not violated any of the rights of the claimant under the Americans With Disabilities Act and that this Court was without jurisdiction to award benefits based upon

any constitutional issues, either federal or state, raised by the claimant.

The following documentary items were received into evidence:

1. The pretrial stipulation (Court Exhibit #1);

2. The deposition of Dr. Lilla Shkolnikov dated May 9, 1994 (Joint Exhibit #1);

3. The deposition of Anita Rothard dated May 10, 1994 (Joint Exhibit #2);

4. The deposition of Morton Barry dated October 28, 1992 (Joint Exhibit #3);

5. Selected portions of the Third Edition of the AMA Guidelines to Evaluate Permanent Impairment (Joint Exhibit #4);

6. A composite of the Florida Impairment Rating Guides (Joint Exhibit #5);

7. Copies of 1990-1993 Florida Statutes §440.015 and §440.02 (Joint Exhibit #6); and

8. Copes of 1994 Florida Statute §440.015 (Joint Exhibit #7).

By way of background information, the claimant is a 68-year old man, who was working for the employer, Burdines, on August 6, 1992, when he injured his back. Prior to that time, he had been working for the employer, Burdines, for some time with an average weekly wage of $211.99 per week. The claimant injured his back on August 6, 1992 while lifting and now suffers from permanent back problems. His health was good and he had no

disability with respect to his low back prior to the accident. Burdines, at all times pertinent to this case has employed more than 25 employees.

After the accident, the claimant received temporary total disability compensation from the date of the accident through the date of maximum medical improvement from the employer/carrier. Thereafter, beginning on November 23, 1992, the claimant received 78 weeks of wage loss benefits. During these 78 weeks, the claimant returned to work at Burdines where they reasonably accommodated his return to work. However, at this job, he was only able physically to make approximately one-half of his pre-injury wages, or approximately $100.00 a week due to his impairment and disability. He left employment at Burdines in January of 1994, and has been working as a part-time teacher making approximately $100.00 a week on a part-time basis. He left Burdines due to the inability to physically continue doing his duties and started teaching since it required less physical activity. These facts are not in dispute by the parties.

The claimant testified that he had tried to return to full-time work after reaching maximum medical improvement, but was only able to work at limited activities and could not return to his pre-injury wages or any of the activities he was performing prior to his accident. He testified and I find that his back had limited him from any type of work activities from the day he was injured until approximately the time of reaching maximum medical improvement and, thereafter, he has been very limited in his ability to perform any type of work or even home activity to the present. His back is no better now than it

was on November 23, 1992, and that the pain and complaints that he had from the date of injury are permanent and limit his in his daily physical and work activities for the remainder of his life.

He also testified that the injury had prevented him from returning to work at Burdines and at other places of employment. This was due to his physical inability to perform the work required by Burdines and because of his physical inability to do work at other places of employment. Furthermore, he was not hired at other places of employment due to his back injury. In other words, his back injury and disability had become a hindrance to him and limited his job opportunities.

I accept the testimony of the claimant and find it very credible.

Dr. Lilla Shkolnikov testified by way of deposition. She is a Board-certified physiatrist [sic], whose testimony I have heard and accepted previously. She indicated that she first began seeing the claimant in August 1992, with complaints of right side and back pain, which appeared to be from an L-4, 5 disc injury received from the injury of August 6, 1992. She treated this back problem conservatively and kept the claimant off total work activities until November 23, 1992, at which time she opined that he reached a point where there would be no further significant medical improvement and that he would be left with a physical impairment.

Dr. Shkolnikov testified that she felt the claimant had a 9% impairment rating using the Minnesota Guidelines as required by Florida law. She placed severe physical limitations on the claimant and indicated that he could

only lift around 10 pounds, stand 2 hours, walk 2-3 hours, sit 2 hours and drive 2 hours. She also indicated that he could occasionally, reach, climb, bend and squat and that these limitations would be of a permanent nature. In her opinion, the claimant had a physical impairment which would significantly limit his major life activities, as noted above, and that he is unable to perform and is significantly restricted in the manner, condition and duration under which he could perform these major life activities with his back as compared to the average person and as compared to his physical abilities prior to his accident. She also opined that the nature and severity of this impairment was of such a duration as expected to last over a lifetime and that it was permanent and would have a long-term impact on the claimant's ability to work. She felt that he would be impaired and significantly restricted in his ability to perform certain classifications of jobs. Dr. Shkolnikov's testimony was unrebutted and I accept this testimony.

Anita Rothard testified extensively by deposition concerning the claimant's condition. It is noted that she has an undergraduate degree in sociology and psychology from the University of California and a two-year Master's degree in rehabilitation counseling from the University of Southern California. She is also a licensed mental health counselor in Florida and nationally-certified as a Certified Rehabilitation Counselor and a Certified Vocational Counselor. She is also recognized by the State of Florida as a Certified Rehabilitation Counselor and a Certified Vocational Evaluator. I accept these qualifications and find her to be an expert in the field of vocational evaluation and rehabilitation.

Ms. Rothard indicated that she interviewed the claimant and reviewed the medical depositions and reports. Ms. Rothard testified extensively as to her background and experience in working with disabled persons. In her opinion, she felt that the claimant was limited physically in accordance with Dr. Shkolnikov's testimony and that the claimant falls within the meaning of a disabled person as that term is used in the Americans With Disabilities Act.

I have reviewed Ms. Rothard's testimony and I appreciate her analysis and opinion that the claimant is a disabled person under the Americans With Disabilities Act based upon the testimony as I have heard it in this hearing.

In my analysis of the issues brought before me at this hearing, I note that the American Medical Association has published the Fourth Edition of the Guides to the Evaluation of Permanent Impairment. I have been asked by the claimant's attorney to review the definitions of impairment and disability as used in the Third Edition. The employer/carrier objects to any use of the AMA Guidelines. I have reviewed these guides and of significant importance is the use of the word "impairment" meaning an alteration of an individual's health status that is assessed by medical means while the term "disability," which is assessed by non-medical means, is an alteration of an individual's capacity to meet personal, social or occupational demands or statutory or regulatory requirements. Stated another way, "impairment" is what is wrong with a body part or organ system and its functioning; "disability" is the gap between what the individual can do and what the individual needs or wants to do.

The AMA Guidelines also state that an individual who is "impaired" is not necessarily disabled and that impairment gives rise to disability only when the medical condition limits the individual's capacity to meet the demands of life's activities. They also state that the concept of "handicap" is related to, yet independent of, the terms "impairment" and "disability". They furthermore state that under the federal law an individual is identified as "handicapped if he or she has an impairment that substantially limits one or more life activities and has a record of such impairment, or is regarded as having such an impairment.

I make no specific finding as to the terms "impairment" or "disability" as used by the American Medical Association other than to recognize this for the purposes of helping to understand the use of these two terms. I would also not that these definitions appear almost synonymous with the definitions of these terms as set forth in the Florida Workers' Compensation Law and the Americans With Disabilities Act.

The workers' compensation law in effect at the time of the claimant's injury, specifically §440.015 Fla. Stat. indicates that the legislative intent of the Florida Workers' Compensation Law is to assure the quick and efficient delivery of disability and medical benefits to an injured worker. §440.02 of the Florida Workers' Compensation Law defines disability as an incapacity, because of the injury, to earn in the same or any other employment the wages which the employee was receiving at the time of the injury. Permanent impairment is defined under §440.02, Fla. Stat., as meaning any anatomic or functional

abnormality or loss, which exists after the date of maximum medical improvement and which results from the injury. A "disabled" person, as defined by the Americans With Disabilities Act, means a person who has a physical impairment that substantially limits one or more major life activities and who has a record of such impairment or is regarded as having such an impairment.

To further analyze the arguments of the claimant herein, I think it is appropriate to further define the full effect of the distinction between impairment and disability with the use of hypothetical examples of claimants "A", "B", and "C". First, assume "A" has pre-injury wages of $300.00 and post-injury wages of $150.00 and 9% impairment rating. "B" has the same pre-injury wages as "A" and post-injury wages of $200.00 and a 19% impairment rating. "C" has pre and post injury wages of $300.00 and a 19% impairment rating. All three injured workers have the same compensation rate (2/3 x $300.00 or $200.00).

	PRE-INJURY WAGES	POST-INJURY WAGES	IMPAIRMENT	DISABILITY	COMPENSATION RATE
A	300	150	9%	50%	200
B	300	200	19%	33%	200
C	300	300	19%	0%	200

Under Florida Workers' Compensation Law prior to July 1, 1990, "A" and "B", after reaching maximum medical improvement, would both be entitled to receive approximately two-thirds of the difference between their

pre-injury wages and post-injury wages for 525 weeks. All disabled workers in Florida at that time had the same time eligibility of 525 weeks for wage loss benefits regardless of their impairment. Once they had a disability, they were entitled to approximately two-thirds of the difference between their pre-injury wages and post-injury wages for the same length of time. "C", with an impairment but *no* disability received no eligibility for benefits.

Under Florida Workers' Compensation Law between July 1, 1990 and January 1, 1994, "A" would only be entitled to approximately two-thirds of the difference between pre-injury wages and post-injury wages for 78 weeks. The 78 weeks are predetermined based upon the 9% impairment rating, By contrast, "B", who was less disabled, but had a higher impairment rating than "A", is entitled to two thirds of the difference between his pre-injury wages and post injury wages for 230 weeks (19% = 230 weeks). In other words, "A", who is more disabled, is not entitled to the same eligibility for benefits as "B" and is entitled to actually less benefits.

Under the Florida Workers' Compensation Law in effect after January 1, 1994, "A" would be entitled to 27 weeks (9% x 3) times $100.00 (which is 50% of his $200.00 compensation rate) or $2,700.00 for his disability. By contrast, "B" would be entitled to 57 weeks (19% x 3) times $100.00 (50% of his $200.00 compensation rate) or $5,700.00. Here again, the lesser disabled but more impaired "B" is entitled to more benefits than the more disabled "A", who is less impaired. "C" will also receive $5,700.00, like "B", even though he suffers no disability.

Under all three scenarios, we have disabled and impaired workers entitled to workers' compensation disability benefits. Their entitlement to disability benefits is a condition of their employment required by law and is limited, segregated and classified based upon numerical impairment ratings. While there may be some instances where disabled workers are entitled to or eligible for the same benefits, clearly the eligibility for these benefits in Florida is based purely on an impairment rating after July, 1990.

The effect of the 1991 and 1994 Workers' compensation laws was to "sechedule" all injuries based on impairments. This is quite similar to prior Florida Workers' Compensation Laws which were referred to as "scheduled injuries" which were separated from whole-body injuries. The leading Florida case on this issue was *Magic City Bottle & Supply Company v. Robinson,* 116 So. 2d 240 (1940). Therein, Justice Thomas indicated that the underlying principle of compensation law – all compensation law – is that benefits relate to loss of earning capacity and not to physical injury, as such. In scheduled benefits, the basic theory remains the same; the only difference is that the effect on earning capacity is a conclusively presumed one, based on observed probabilities in many similar cases, instead of a specifically proven one, based on the individual's actual wage loss experience. To avoid this impossible task, the apparently "cold-blooded system" of putting average price tags on arms, legs, eyes and fingers has been devised. Obviously, *Magic City* was decided prior to the Americans With Disabilities Act becoming effective. Furthermore, the concept of disability was distinguished from impairments prior to 1990.

I have also reviewed §1630 of 29 CFR Chapter XIV dealing with the regulations implementing the equal employment provisions of the Americans with Disabilities Act and note the following based upon my review of the ADA. §1630.1 requires equal employment opportunities for qualified individuals with disabilities. §1630.2(e) defines employer as a person engaged in an industry affecting commerce who has 25 or more employees. The employer, Burdines, obviously falls within this definition. §1630.2(g) defines disability as a physical or mental impairment that "substantially limits" one or more of the major life activities of an individual who has a record of an impairment or who is regarded as having an impairment. §1630.2(j) indicates that the term "substantially limits" means the inability to perform a major life activity for the average person in general population there are also several other areas covered. The claimant would appear to be within these guidelines.

§1630.4 deals with the discrimination prohibited under the ADA and indicates that it is unlawful for a covered entity to discriminate on the basis of disability against a qualified individual with a disability in regard to the fringe benefits available by virtue of employment whether or not administered by the covered entity or in any other term, condition, or privilege or employment. My reading of this would lead me to find that workers' compensation falls within the meaning of this provision.

§1630.5 indicates that it is unlawful for a covered entity to limit, segregate or classify employees with disabilities in a way that adversely affects the employment opportunities and that employees with disabilities are to be accorded equal access to whatever health insurance

coverage the employer provides other employees. Furthermore, benefit reduction adopted for discriminatory reasons are in violation of this part of the Act. See, *Alexander v. Choate,* 469 U.S. 287 (1985). Herein lies the crux of the claimant's arguments.

It is clear the claimant herein is not entitled to the same eligibility for wage loss benefits as all other disabled workers. There is no question §440.15, Fla. Stat., limits eligibility for disability compensation to injured workers based upon impairment ratings and not disability. The law clearly allows more eligibility for benefits to greater-impaired persons than it does to lesser-impaired persons and clearly all disabled persons are not entitled to the same eligibility for benefits. Florida Workers' Compensation Law does not take into consideration the distinction between disability and impairment as those definitions are defined in Florida statutes, including the 1993/1994 Statute, case law, and as commonly used in medical guides such as published by the American Medical Association.

It is clear that lesser-impaired disabled persons, such as the claimant herein, are not eligible for the same benefits as other disabled persons who have a greater impairment rating. For example, the claimant argues that someone like the claimant herein, who is disabled and who will suffer a 50% reduction of his earnings for the remainder of his life, is only entitled to 78 weeks of eligibility for benefits. Another person may have a greater impairment rating but have a lesser disability or no disability and may, therefore, be entitled to more eligibility for impairment benefits. This is true under Florida Workers' Compensation Law after 1990.

I recognize that all disabled persons, either as disabled persons as defined by the Americans With Disabilities Act or as used in the Florida statutes or in other guides, are not eligible for the same disability benefits under the Florida Workers' Compensation Law after July 1, 1990. Whether or not the Florida Workers' Compensation Law, in effect on the date of the claimant's injury, violates the Americans With Disabilities Act is not within my ability to rule upon as a non-constitutional judge of compensation claims; nor is it within my power to find that the statute in question violates any of the state or federal constitutional rights or remedies guaranteed by the Florida or United States constitutions.

WHEREFORE, I find I am without jurisdiction to find that the claimant's rights have been violated under any of these provisions. I further find that the parties have agreed that the claimant is not permanently and totally disabled. I further find that the claimant was entitled to seventy-eight (78) weeks of benefits in accordance with §440.15, Fla. Stat. and was paid those benefits. I find that the claimant is not eligible for any further wage loss benefits under the Florida statutes and, therefore, deny the claimant's claim herein with prejudice.

DONE AND ORDERED in Chambers, In Sarasota, Manatee County, Florida, this the 20 day of June 1994.

/s/ Joe E. Willis (Seal)
Judge of Compensation
Claims

I CERTIFY that the foregoing Order was entered and a true copy served by mail or hand delivery this 20 day of

June 1994, on LANCASTER & EURE, P.A., Post Office Drawer 4257, Sarasota, FL 34230, Paul N. Ingram, Esquire, P.O. Box 2019, Sarasota, FL 34230, Morton Barry, 1628 Boathouse Circle, G21, Sarasota, FL 34231, Sarasota Square Mall, 8201 S. Tamiami Trail, Sarasota, FL 34238 and Laurie Arnold, The Travelers, P.O. Box 30393, Tampa, FL 33630-3393.

/s/ Deborah J. Campbell
Assistant to the Judge of
Compensation Claims

Florida Statute § 440.15(3)(b)4.d

(3) PERMANENT IMPAIRMENT AND WAGE-LOSS BENEFITS. –

* * *

4. The right to wage-loss benefits shall terminate upon the occurrence of the earliest of the following:

a. As of the end of any 2-year period commencing at any time subsequent to the month when the injured employee reaches the date of maximum medical improvement, unless during such 2-year period wage-loss benefits shall have been payable during at least 3 consecutive months. This limitations period shall not be tolled or extended by the incarceration of the employee or by virtue of the employee becoming an inmate of a penal institution.

b. For injuries occurring on or before July 1, 1980, 350 weeks after the injured employee reaches the date of maximum medical improvement.

c. For injuries occurring after July 1, 1980, but before July 1, 1990, 525 weeks after the injured employee reaches maximum medical improvement.

d. For injuries occurring after June 30, 1990, the employee's eligibility for wage-loss benefits shall be determined according to the following schedule:

(I) Twenty-six weeks of eligibility for permanent impairment ratings up to and including 3 percent;

(II) Fifty-two weeks of eligibility for permanent impairment ratings greater than 3 and up to and including 6 percent.

(III) Seventy-eight weeks of eligibility for permanent impairment ratings greater than 6 and up to and including 9 percent;

(IV) One hundred four weeks of eligibility for permanent impairment ratings greater than 9 and up to and including 12 percent; and

(V) One hundred twenty weeks of eligibility for permanent impairment ratings greater than 12 percent and up to and including 13 percent; 135 weeks of eligibility for permanent impairment ratings greater than 13 percent and up to and including 14 percent; 150 weeks of eligibility for permanent impairment ratings greater than 14 and up to and including 15 percent; 170 weeks of eligibility for permanent impairment ratings greater than 15 percent and up to and including 16 percent; 190 weeks of eligibility for permanent impairment ratings greater than 16 percent and up to and including 17 percent; 210 weeks of eligibility for permanent impairment ratings greater than 17 percent and up to and including 18 percent; 230 weeks of eligibility for permanent impairment ratings greater than 18 percent and up to and including 19 percent; 250 weeks of eligibility for permanent impairment ratings greater than 19 percent and up to and including 20 percent; 275 weeks of eligibility for permanent impairment ratings greater than 20 percent and up to and including 21 percent; 300 weeks of eligibility for permanent impairment ratings greater than 21 percent and up to and including 22 percent; 325 weeks of eligibility for permanent impairment ratings greater than 22 percent and up to and including 23 percent; 350 weeks of eligibility for permanent impairment ratings greater than 23 percent and up to and including 24 percent; 364 weeks

of eligibility for permanent impairment ratings greater than 24 percent.

* * *